

PILLSBURY WINTHROP SHAW PITTMAN LLP

DAVID A. JAKOPIN #209950

david.jakopin@pillsburylaw.com

DANIEL J. RICHERT #232208

daniel.richert@pillsburylaw.com

2475 Hanover Street

Palo Alto, CA 94304-1114

Telephone: (650) 233-4500

Facsimile: (650) 233-4545

MCDONNELL BOEHNEN HULBERT & BERGHOFF LLP

BRADLEY J. HULBERT (admitted *pro hac vice*)

hulbert@mbhb.com

RICHARD A. MACHONKIN (admitted *pro hac vice*)

machonkin@mbhb.com

KURT W. ROHDE (admitted *pro hac vice*)

rohdek@mbhb.com

300 South Wacker Drive

Chicago, IL 60606-6709

Telephone: (312) 913-0001

Facsimile: (312) 913-0002

Attorneys for Defendants

DIGITAL NETWORKS NORTH AMERICA, INC. and

LEGACY SUPPORT SERVICES, LTD.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. 07 CV 5568 JSW

JENS ERIK SORENSEN, as Trustee
of SORENSEN RESEARCH AND
DEVELOPMENT TRUST,

Plaintiff,

v.

DIGITAL NETWORKS NORTH
AMERICA, INC., a Delaware
corporation; LEGACY SUPPORT
SERVICES, LTD. d/b/a S2G; and
DOES 1-100,

Defendants.

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S EVIDENTIARY
OBJECTION TO DECLARATION OF
KURT W. ROHDE**

Date: June 13, 2008

Time: 9:00 a.m.

Ctrm: 2, 17th Floor

Judge: Hon. Jeffrey S. White

Defendants Legacy Support Services (“Legacy”) and Digital Networks North America, Inc. (“DNNA”) hereby respond to Plaintiff’s Evidentiary Objection to Declaration of Kurt W. Rohde (“the Rohde Declaration”).

Plaintiff argues that paragraphs 3, 5, and 8-13 of the Rohde Declaration contain evidence that is not admissible under the Federal Rules of Evidence and should be stricken. Local Rule 7-5 governs affidavits and declarations in support of motions and looks to Fed. R. Civ. P. 56(e) as the standard. Local Rule 7-5 also does not require all statements to be made based on personal knowledge. To the contrary, the rule allows statements to be made upon information or belief. As set forth below, the disputed portions of the Rohde Declaration clearly comply with the requirements of Fed. R. Civ. P. 56(e) and Local Rule 7-5.

1. Paragraph 3

Plaintiff tries to portray the disputed statements in paragraph 3 as being outside of Mr. Rohde’s competence. In fact, the statements relate to procedural facts that are absolutely the proper subject of an attorney declaration under Fed. R. Civ. P. 56(e). *Sitts v. United States*, 811 F.2d 736, 741-42 (2d Cir. 1987). The statements are also based on Mr. Rohde’s personal knowledge, as evidenced by paragraph 1 of the Rohde Declaration: “Unless otherwise stated herein, I have personal knowledge of the facts stated in this declaration ...” As basis for Mr. Rohde’s personal knowledge, paragraph 4 explains that Legacy was represented by McDonnell Boehnen Hulbert & Berghoff LLP (“MBHB”) before January 13, 2008. Thus, the Rohde Declaration provides competent evidence that Legacy, through its counsel, was aware of the Court’s Time Extension Order (Docket #33) prior to January 13, 2008 and reasonably relied on the plain language of that Order.

Plaintiff’s remaining arguments, that the statements are hearsay, constitute waiver of attorney-client privilege, and are inadmissible legal opinions, are wholly without merit. The statements are not hearsay because they are not statements made by another. The statements do not waive attorney-client privilege because they describe facts, not privileged communications. The statement that “Legacy reasonably relied on the plain language of the Order ...” is not a legal opinion because Legacy’s reliance on the Order is clearly a factual matter. That Legacy’s

reliance on the Order was “reasonable” is a factual inference based on the plain language of the Order. Plaintiff claims to have a different view of the Time Extension Order, but Plaintiff has no basis for excluding evidence regarding Legacy’s view.

2. Paragraph 5

Plaintiff argues that information regarding the *second* reexamination of its patent is irrelevant. However, pages 4 and 5 of the Memorandum in Support of Legacy’s Motion to Set Aside Any Appearance of Default (Docket # 52) explain the relevance of this second reexamination. Simply put, the fact that the USPTO has found substantial new questions of patentability in two, concurrent reexaminations of the patent-in-suit shows that Legacy has a meritorious defense of the patent’s invalidity. That a party has such a meritorious defense is a factor weighing in favor of setting aside any default by that party. *Franchise Holding II, LLC v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925-926 (9th Cir. 2004).

3. Paragraphs 8-13

Plaintiff argues that its pattern of quickly seeking entry of default in other cases is irrelevant. However, pages 6 and 7 of the Defendants’ Memorandum in Opposition to Plaintiff’s Motion (Docket # 48) explain the relevance of these cases. Specifically, Plaintiff has, in other cases, filed for entry of default within one or two days after occurrence of the alleged default. Thus, Plaintiff was clearly capable of seeking entry of Legacy’s alleged default before this Court’s Stay Order. Because Plaintiff failed to do so, any prejudice that Plaintiff may claim is the result of Plaintiff’s own inaction.

//

//

//

//

//

//

//

1 Accordingly, Defendants respectfully request that the Court overrule Plaintiff's
2 evidentiary objections and deny Plaintiff's request to strike portions of the Rohde Declaration.

3 Dated: May 15, 2008.

4 PILLSBURY WINTHROP SHAW PITTMAN LLP
5 DAVID A. JAKOPIN
6 DANIEL J. RICHERT
7 2475 Hanover Street
8 Palo Alto, CA 94304-1114

9 By /s/ Daniel J. Richert

10 Daniel J. Richert

11 Attorneys for Defendants
12 DIGITAL NETWORKS NORTH AMERICA, INC.
13 LEGACY SUPPORT SERVICES, LTD. d/b/a S2G

14 Of Counsel:

15 Bradley J. Hulbert (admitted *pro hac vice*)
16 Richard A. Machonkin (admitted *pro hac vice*)
17 Kurt W. Rohde (admitted *pro hac vice*)
18 MCDONNELL BOEHNEN HULBERT & BERGHOFF LLP
19 300 South Wacker Drive
20 Chicago, Illinois 60606
21 312-913-0001 Telephone
22 312-913-0002 Facsimile
23 hulbert@mbhb.com
24 machonkin@mbhb.com
25 rohdek@mbhb.com
26
27
28